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NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1987

HARRY CONNICK,
District Attorney for the Parish of Orleans,
Petitioner

VERSUS

DONALD MAIRENA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
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Questions Presented

1. Is a municipal office liable for the unintentional but wrongful detention of a material witness absent proof of either an affirmative decision or policy or of a custom of wrongful behavior and absent a pattern of prior incidents sufficient to put officials on notice that remedial procedures were needed?

2. Is a district attorney, when acting on behalf of the state, a state or a local officer for purposes of Eleventh Amendment immunity?

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Statutes

Opinions Below

The opinion of the court of appeals, which is reproduced in Appendix B commencing at page A-3, is reported at 816 F.2d 1061 (5th Cir. 1987). The order of the court of appeals denying defendant's petition for rehearing is reproduced in Appendix A at page A-1.

Jurisdictional Grounds

The decision of the United States Court of Appeals for the Fifth Circuit was entered on May 18, 1987. An application for rehearing was denied on July 15, 1987. This Court has jurisdiction to

review the decision of the court of appeals pursuant to 28 U.S.C. § 1254 (1).

Statutory Provisions

The following federal statutes and state constitutional provisions, set forth in Appendix D beginning at page A-14, are involved in this case:

United States Const., Amendment 11;

42 U.S.C. § 1983;

La. Const. art. 5, § 26 (A);

La. Const. art. 5, § 26 (B).

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

HARRY CONNICK,
District Attorney for the Parish of
Orleans, State of Louisiana
Petitioner

VERSUS

DONALD MAIRENA
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Harry Connick, District Attorney for the Parish of Orleans, petitioner, hereby petitions the Court to issue a writ of certiorari to review the judgment and

opinion of the United States Court of Appeals for the Fifth Circuit entered on May 18, 1987.

STATEMENT OF THE CASE

1. Course of Proceedings Below

Mr. Mairena filed a complaint on July 2, 1985, seeking damages for alleged civil rights violations pursuant to 42 U.S.C. § 1983. He alleged that he was wrongfully detained as a material witness after his testimony was no longer necessary, the underlying criminal case having been closed.

Defendants were Charles Foti, the Criminal Sheriff of Orleans Parish, Edwin Lombard, the Clerk of Court of the Criminal District Court for the Parish of Orleans, and Harry Connick, the District Attorney for the Parish of Orleans. The clerk and the sheriff each negotiated settlements with the plaintiff and were dismissed as defendants prior to trial.

The case was tried by jury; there was a judgment for the plaintiff, awarding damages in the amount of $40,000. Three-quarters of the damages were attributed by the jury to the district attorney in his official capacity. The district attorney filed a motion for judgment n.o.v. which was denied. The district attorney appealed to the United States Court of Appeals for the Fifth Circuit. The judgment was affirmed by a three judge panel on May 18, 1987. Rehearing was denied on July 15, 1987.

2. Statement of the Facts

Donald Mairena, the plaintiff, witnessed a shooting in a New Orleans bar on April 30, 1983. After the shooting, the plaintiff moved several times and in February of 1984, he signed on board a

ship. A warrant for his arrest as a material witness was issued. The criminal case was later closed but the witness warrant was not recalled.

Mr. Mairena ultimately returned to New Orleans and was detained some months later. Notice of his arrest was sent by the Sheriff to the section of the court handling the case and to the bond section of the District Attorney's office. Mr. Mairena protested his detention by writing a letter to the Sheriff's Investigative Division. He made a number of these written complaints, all directed to employees of the Sheriff, but these were ignored. The plaintiff was held in jail for approximately 23 days before his release.

The Office of the District Attorney had no specific policy with regard to recalling material witness warrants after

criminal cases were closed. The defendant's assistants testified at trial that warrants for material witnesses were rare and that none of them knew of any other instance in which a witness was detained when there was no longer any need for his testimony.

The plaintiff offered only one prior instance in which a material witness was detained on warrants left outstanding after proceedings were concluded. The case was that of Linday Howard, who remained in jail 11 months after a grand jury proceeding for which she was called to testify had terminated. Howard was avoiding service of process, and the district attorney's office could not reach her prior to the grand jury hearing. Howard was eventually found and jailed pending the trial of the criminal defendants. She was released on the

condition that she report to the Assistant D.A. every week. The criminal trial was held two months after Howard's release from jail. The case is, therefore, entirely inapposite.

Reasons For Granting The Writ

The holding of the Fifth Circuit in this case is in direct conflict with this Court's settled rulings governing municipal liability for constitutional torts and, further, is inconsistent with the decisional law within the Fifth Circuit itself. The decision goes so far as to impose vicarious liability upon a municipal office without proof of an unconstitutional policy or of an affirmative wrongful act by policy-makers. It establishes liability for failure to adopt policy when policymakers had no notice that a policy was needed.

Review by this Court is necessary to right this wrong and to reconcile the conflict. Review will also give the circuit courts guidance in addressing the issues left open by the Court in City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). These include determining whether a policy that is not unconstitutional can meet the policy requirement for municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978), and whether failure to establish training procedures, absent notice of need for a procedure, can constitute policy sufficient to be the moving force behind a constitutional tort.

The Fifth Circuit also denied Eleventh Amendment immunity to the defendant, a district attorney in his official capacity, by characterizing him as a

local official. This result misconstrues the functional purpose of a district attorney under state law and conflicts with the decisions of the Louisiana Supreme Court on this issue. This holding, when read together with this Court's decision in Imbler v. Pachtman, 424 U.S. 409 (1976), completely defeats a district attorney's freedom to prosecute without the chilling effect of civil suits. The potential effect on criminal justice and a district attorney's independent exercise of judgment requires the supervision of this Court.

I. The Fifth Circuit Holding Establishing Municipal Liability For A 42 U.S.C. § 1983 Violation Without Proof Of Any Affirmative Unconstitutional Policy Or Custom Which Inflicts Injury Is Inconsistent With This Court's Decisions In Pembaur v. City of Cincinnati And City of Oklahoma City v. Tuttle And Conflicts With The Decisional Law Of The Fifth Circuit.

The plaintiff was arrested and detained under a material witness warrant that was

left outstanding after the criminal case was closed. Though the District Attorney's office had formulated policy for closing case files, there was no procedural check included for outstanding witness warrants. There is no state or local law requiring the D.A. to establish such a procedure.

A. Policy

This Court held in Pembaur v City of Cincinnati, 475 U.S. 469, (1986), that "municipal liability under Section 1983 attaches where- and only where- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." 475 U.S. at ___, 106 S.Ct. at 1300.

In the present case, there was no affirmative decision to leave the material witness warrant outstanding; there was no conscious choice to not establish a procedural check for recalling material witness warrants. The affirmative act required to impose liability under Pembaur is not present here.

In City of Oklahoma City v. Tuttle, this Court dealt with a situation in which the court of appeals sanctioned the jury's inference that an official policy of inadequate police training caused the plaintiff's injury. This Court rejected the argument that municipal liability could be established without proof of either a specific action or of a conscious choice by policymakers. 471 U.S at ___, 105 S.Ct. at 2435-6.

The Fifth Circuit in this case upheld municipal liability based on a theory that the defendant had a "policy" of inadequate procedure, training, and supervision. This result, sanctioned by the Fifth Circuit, en banc, is in direct opposition to the result mandated by Tuttle, supra.

B. Custom

In Pembaur, this Court noted that under Monell v. Department of Social Services, 436 U.S. 658 (1978), municipal liability could be based on a settled municipal custom even in the absence of any affirmative decision by policymakers. 475 U.S. at ___, 106 S.Ct. at 1299, n.10. The Fifth Circuit has interpreted "custom" to be a persistent practice or pattern of similar incidents. Languirand v. Hayden, 717 F. 2d 220 (5th Cir.1983).

In this case, the plaintiff could offer only two incidents where material witness warrants were left outstanding after proceedings were concluded -- his own and one other. The other incident is inapposite. There, the warrant was issued pursuant to a grand jury hearing. The witness was arrested on the warrant after the grand jury proceeding was concluded and deliberately held so she could testify at the subsequent trial. Thus, the plaintiff's case of unintentional detention is an isolated incident and not the persistent practice that qualifies as custom. This single incident is precisely the type of situation on which the Fifth Circuit has previously refused to base liability. Languirand v Hayden, 717 F.2d 220 (5th Cir. 1983); Ramie v. City of Hedwig

Village, Texas, 770 F.2d 1081 (5th Cir. 1985); Bennett v City of Slidell, 728 F.2d 762 (5th Cir. 1984).

Moreover, absent proof of wrongful affirmative acts by the defendant, the Fifth Circuit holding operates to allow 42 U.S.C. § 1983 liability based on a theory of vicarious liability for the failure to recall the warrant. It is well settled that municipal liability cannot be based on theories of vicarious liability or respondeat superior. Pembaur v. City of Cincinnati, supra, and Monell v. Department of Social Services, supra.

The result sanctioned by the Fifth Circuit in this case is, therefore, irreconcilable with this Court's decisions in Pembaur and Tuttle and is inconsistent with the decisional law in the Fifth Circuit. This departure by the

court of appeals should be subjected to the review of this Court. Additionally, this Court's guidance is needed to determine if a policy that is not unconstitutional can meet the policy requirement for municipal liability under Monell.

II. The Fifth Circuit Holding Establishing Municipal Liability For Failure To Adopt Policies To Prevent Constitutional Violations Absent A Pattern Of Similar Incidents Is Inconsistent With This Court's Decision In Tuttle And Conflicts With The Decisional Law Of The Fifth Circuit.

The plaintiff could prove only one incident (his own) as evidence of injury caused by defendant's failure to adopt a policy to prevent constitutional violations. In Tuttle, this Court held that "where policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of

the municipality, and the causal connection between the 'policy' and the constitutional deprivation." 471 U.S. at ____, 105 S.Ct. at 2436. In this case, municipal policy was not itself unconstitutional. Therefore, this single incident is not sufficient to impose liability.

In Tuttle, this Court left open the question of "whether a policymaker's 'gross negligence' in establishing ....training practices could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required." 471 U.S. at ____, 105 S.Ct. at 2436, n.7. However, when faced with this issue, the Fifth Circuit has repeatedly refused to establish

municipal liability for failure to adopt policies to prevent violations without proof of a pattern of similar incidents which would serve to put the city officials on notice. Vela v. White, 703 F.2d 147 (5th Cir. 1983); Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984); Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980); Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983).

In Languirand, the Fifth Circuit held that "a municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials...in the absence of evidence at least of a pattern of similar incidents." 717 F.2d at 227-28. The court went on to note that failure to adopt a policy to prevent injury before an offense occurs cannot be converted to

having a policy of inadequacy. 717 F.2d at 229.

In the present case, the Fifth Circuit sanctioned municipal liability for the failure to adopt a policy to prevent constitutional violations even though there was no proof of a pattern of similar incidents sufficient to put officials on notice that a procedure was needed. The Fifth Circuit holding misconstrues this Court's decision in Tuttle and conflicts with the decisional law of the Fifth Circuit. This Court's guidance is needed to determine whether failure to establish policy or training procedures can constitute "policy" sufficient to be a moving force behind constitutional violations. Therefore, a writ should issue to review the holding of the Fifth Circuit and address the issues presented.

III. The Fifth Circuit Holding That A District Attorney Is Not A State Official Entitled To Eleventh Amendment Immunity Misconstrues State Constitutional Provisions, Conflicts With The Decisions Of The Louisiana Supreme Court and Completely Defeats A District Attorney's Immunity From Civil Suit, Thereby Threatening The Independent Exercise Of His Professional Judgment.

The office of the District Attorney is created and its powers are conferred upon it by state constitutional provision, the Louisiana Constitution of 1974, Article 5, Section 26(A) and (B). The Constitution provides that there shall be a District Attorney in each judicial district. These are state judicial districts which are not necessarily drawn upon parish lines. The Constitution further provides that the District Attorney, or his designated assistant, "shall have charge of every criminal prosecution by the State in his district, be the representative of the

State before the Grand Jury in his district, and be the legal advisor to the Grand Jury", a state body. Article 5, Section 26(B).

The district attorney is treated as a state official by the Louisiana Supreme Court. In City of New Orleans v. State, 426 So.2d 1318 (La. 1983), the Louisiana Supreme Court characterized the district attorney as a state official in concluding that "the legislative acts mandating ... payments by the City to the State's employees and offices constitute a valid exercise of the State's police power." 426 So.2d at 1321.

In Diaz v. Allstate Insurance Co., 433 So.2d 699 (La. 1983), the Court held that a "District Attorney is a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of

his office." [Citations omitted] The court went on to state that the district attorney was a state, not a local official. 433 So.2d at 701.

Relying on Crane v. State of Texas, 766 F.2d 193 (5th Cir. 1985), the Fifth Circuit rejected defendant's contention that he was a State official entitled to Eleventh Amendment immunity. The court relegated the argument to a footnote and failed to address the substantial distinctions between Crane and the case at the bar.

In Crane, the court found that the district attorney was acting as the legal officer for the county in advising it of the method for issuing a capias. 759 F.2d at 414. The district attorney in Crane was "functioning" as a local official when he caused the harm.

In the present case, the defendant's office was not acting in furtherance of a county purpose as was the official in Crane. Here, the material witness warrant was issued as part of the state's prosecution of a criminal matter as provided by state law. On a functional analysis, the defendant was clearly a state actor.

The result of the holding of the Fifth Circuit herein is to completely defeat the immunity of a District Attorney from suit for civil damages under 42 U.S.C. § 1983. In Imbler v. Pachtman, 424 U.S. 409 (1976), this Court identified prosecutorial immunity as a personal defense not available to a defendant in an official capacity suit. The decision in the present case erroneously denies Eleventh Amendment immunity to a state

district attorney. Restricting prosecutorial immunity under Imbler to a personal defense, while at the same time denying to the district attorney's office sovereign immunity to which it is entitled when acting for the state, will be devastating to the public fisc. It will subject district attorneys to a multitude of civil suits, threatening the independent prosecutorial judgment of that office. Therefore, the decision of the Fifth Circuit in this case should be subjected to the review of this Court.

Conclusion

This case has broad policy implications in the area of municipal liability for claims under 42 U.S.C. § 1983. A writ should issue to review the decision of the Fifth Circuit and to provide guidance to the lower courts in this area.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served upon Russell Stegeman, Esq., Stegeman and Marrero, 425 Weyer Street, Gretna, Louisiana 70053, Counsel for Respondent, three copies of this document by depositing the copies in the United States post office, with first-class postage paid, in compliance with Supreme Court Rules 28.3 and .5 this 9th day of October, 1987.

Evelyn T. Brooks

EAVELYN T. BROOKS

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3238

DONALD MAIRENA,

Plaintiff-Appellee,

versus

CHARLES FOTI, Criminal Sheriff for the Parish of Orleans, et al.,

Defendants,

HARRY CONNICK, District Attorney for the Parish of Orleans,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 18, 5 Cir., 1987, 816 F.2d 1061)
(July 15, 1987)

Before GARWOOD, JOLLY and HILL, Circuit Judges.

PER CURIAM:

The petition for rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on

rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY
United States Circuit Judge

APPENDIX B

Donald MAIRENA, Plaintiff-Appellee,

v.

Charles FOTI, Criminal Sheriff for the Parish of Orleans, et al., Defendants,

Harry Connick, District Attorney for the Parish of Orleans,
Defendant-Appellant.
No. 86-3238.

United States Court of Appeals,
Fifth Cirucit.
May 18, 1987.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARWOOD, JOLLY and HILL, Circuit Judges.

E. GRADY JOLLY, CIrcuit Judge:

The facts in this case are like a bad dream: Donald Mairena, who had commited no crime, was arrested on an outstanding material witness warrant and, notwithstanding his pleas, thrown in jail for twenty-three days, although the case to which he was a witness had been closed months earlier when the defendant had pleaded guilty. Harry Connick, the District Attorney of Orleans Parish, Louisiana, now appeals the district court's judgment against him in his official capacity and in favor of Mairena, who sued Connick under 42 U.S.C. § 1983 for deprivation of a constitutional right. Because we find that Mr.

Mairena's suit demonstrated the necessary elements for a successful section 1983 cause of action, we affirm the judgment of the district court.

I

The story began when Donald Mairena witnessed a shooting that occurred at the Latin American Club in New Orleans on April 30, 1983. Although Mairena had no relationship to the victim or perpetrator of the shooting, he witnessed the crime and chased the perpetrator, at considerable personal risk. Mairena was interviewed by law enforcement authorities investigating the case. He voluntarily cooperated and gave them his address. He heard nothing further about the incident until his arrest, almost two years later, on February 4, 1985.

The perpetrator of the shooting, Nicholas Ocasio, was ultimately apprehended, and criminal proceedings were instituted against him in Orleans Criminal District Court. During the course of the proceedings, prosecuting attorneys felt that Mairena might be needed as a witness if the case went to trial. When they were unable to locate him, an assistant district attorney caused a warrant to be issued on February 16, 1984, for Mairena's arrest as a material witness. On May 21, 1984, Ocasio pled guilty to the charges stemming from the shooting.

Following Ocasio's plea, the prosecuting assistant attorney closed the prosecution file, which was then transmitted to administrative personnel in order to cull post-conviction tracking information for the district attorney's computer system, to insure that applicable appearance bonds were cancelled, and to store the file in the district attorney's records. The criminal case was marked closed on the court's record on May 21, 1984.

On February 4, 1985—eight and one-half months after the closing of the underlying criminal case—Mariena was arrested on the outstanding material-witness warrant. He was incarcerated at the Orleans Parish Prison for twenty-three days. On February 5, the district attorney's office was informed of Mairena's arrest and incarceration, but took no action to inquire as to the reasons for Mairena's incarceration or to inform the court or sheriff that his detention was no longer necessary. Mairena was not released until a private attorney, contacted by one of his friends, informed the presiding judge of Criminal Court Division C of his incarceration. This was more than twenty days after the district attorney's office had been informed of Mairena's incarceration.

II

Mairena's complaint was filed July 2, 1985, seeking damages for alleged civil rights violations pursuant to 42 U.S.C. § 1983. The gravamen of the complaint was that Mairena was wrongfully arrested, incarcerated and detained as a material witness at a time when his testimony was no longer necessary, the relevant criminal case having been closed. Defendants were Charles Foti, the Criminal Sheriff of Orleans Parish, who had arrested and imprisioned the plaintiff; Edwin Lombard, the Clerk of the Court of the Criminal District Court for the Parish of Orleans, whose office was responsible for the processing of the plaintiff's file and the related paper work; and Harry Connick, the District Attorney for the Parish of Orleans, whose assistant had managed the prosecution of the Ocasio criminal case.

The clerk and sheriff reached settlements with the plaintiff, and the claim against the clerk was dismissed on February 4, 1986. The settlement with the sheriff has yet to be funded, but on March 24, 1986, a judgment on the

settlement was entered of record. The case against the district attorney was tried by jury on February 17, 1986, before Magistrate Fonseca pursuant to a stipulation of the parties. The jury found in favor of the plaintiff, holding that the defendant's actions were the proximate but not the sole cause of injury to Mairena. The jury further held that three-quarters of Mairena's damages were attributable to the district attorney, and on that basis assessed an award of $30,000 against the district attorney. The district attorney's motion for j.n.o.v. filed February 28, 1986, was denied by judgment entered March 19, 1986, This appeal followed.

III

[1] The district attorney argues that the judgment in favor of Mairena must be reversed for several reasons: (1) Mairena's section 1983 action is barred by the eleventh amendment; (2) Mairena's section 1983 suit is barred by prosecutorial immunity; (3) Mairena has failed to meet the custom or policy requirement for municipal liability; (4) Mairena failed to establish the elements for his pendent state law tort claim; and (5) the jury's assessment of damages against the district attorney was erroneous. Because we reject each of the arguments offered by the district attroney, we affirm the judgment in favor of Mr. Mairena.[1]

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[1] We discuss the custom or policy issue and the damages issue in the main body of the opinion. The remaining arguments advanced by the district attorney lack merit. The district attorney argues that Mairena's suit is barred by the eleventh amendment. This court addressed that contention in *Crane v. State of Texas*, 766 F.2d 193 (5th Cir. 1985), and held that for purposes of section 1983 liability, a Texas district attorney was a local government official. We can see no basis to distinguish this Louisiana case from *Crane*.

In addition, the district attorney argues that Mairena's suit is barred by prosecutorial immunity. But prosecutorial immunity is a

IV

The district attorney is being sued in his official capacity. For purposes of liability, a suit against a public official in his official capacity is in effect a suit against the local government entity he represents. *Kentucky v. Graham,* 105 S.Ct. at 3105; *Brandon v. Holt,* 469 U.S. 464, 105 S.Ct. 873, 876, 83 L.Ed.2d 464 (1985). The district attorney argues that Mairena has not met the requirements for recovery against the Orleans Parish district attorney's office under section 1983, because he has not shown that his wrongful incarceration was the result of a custom or policy of the district attorney's office. We cannot agree.

In *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court, holding for the first time that local government may be sued for compensatory damages, *id.* at 690, 98 S.Ct. at 2035, made clear that local government liability under section 1983 is established only where the "execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury." *Id.* at 694, 98 S.Ct. at 2036. Although he argues that Mairena has failed to meet the policy or custom requirement, the district attorney does not specify whether Mairena's failure to meet

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(footnote 1 continued)
personal defense, and is not applicable in this case since the district attorney is being sued in his official capacity only. *See Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Owen v. City of Independence, Mo.,* 445 U.S. 622, 638 n. 18, 100 S.Ct. 1398, 1409 n. 18, 63 L.Ed.2d 673 (1980).

Finally, the district attorney argues that Mairena's tort claim against him was insufficient under state law because it failed to allege actual malice. But the district attorney does not advance a valid reason for reversing the district court since no damages were awarded to Mairena on his state law claim.

the requirement resulted from erroneous instructions on the part of the magistrate or from insufficient evidence. But since the district attorney failed to object to the jury instructions,[2] we construe his appeal as raising solely evidentiary objections on the policy or custom issue.

Therefore, the issue raised before this court is whether the evidence in the record supports the jury's verdict under the instructions given by the magistrate. We believe that the evidence supports the verdict.

Under the standard for reviewing jury verdicts and factual findings set out by this court in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969)(en banc), a jury's finding is upheld if reasonable and fair-minded people in the

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[2] Fed.R.Civ.P. 51 explicitly states that a party cannot "assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict." The district attorney failed to do this.

The exception to this rule is a narrow one. Despite a party's failure to make a timely objection to a jury instruction, a reviewing court may still reverse if the error committed by the district court is so fundamental as to result in a miscarriage of justice. *Sandidge v Salem Offshore Drilling Co.*, 764 F.2d 252, 262 (5th Cir. 1985); *Higgins v. Smith International*, 716 F.2d 278, 283 n. 4 (5th Cir. 1983). Such a miscarriage of justice occurs when the erroneously given charge is probably responsible for an incorrect verdict, leading to a result that is manifestly unjust. *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 536, 538 (5th Cir. 1984). Given the grievous wrong done to Mairena, we do not believe that the jury verdict in his favor was manifestly unjust.

Moreover, the Supreme Court has recently indicated in the context of a section 1983 suit that aside from Rule 51, prudential considerations counsel against reversing a judgment for an error in jury instructions when the appealing party has accepted those instructions. *City of Springfield v. Kibbe*, — U.S. —, 107 S.Ct. 1114, 1116, 94 L.Ed.2d 293 (1987) (per curiam). In this case it was Mairena who objected to the magistrate's instructions, while the district attorney acquiesced readily to the instructions.

exercise of impartial judgment might reach different conclusions. *Id.* at 374. We also note that juries are free to draw reasonable inferences from the evidence. *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841, 851 (5th Cir. 1967).

The magistrate instructed the jury that it could find for the plaintiff only if it found that (1) there was no procedure designed to prevent Mairena's arrest and incarceration; (2) the need for such a procedure existed before Mairena's arrest and incarceration; (3) the failure to establish such a procedure was deliberate or the result of callous indifference; (4) Mairena was arrested as a material witness in connection with a criminal matter that was already concluded (and hence his constitutional rights were violated); (5) the district attorney either participated in the failure to establish procedures that would have safeguarded Mairena's rights, or the failure to promulgate such procedures was causally connected to a breach of duty imposed on the district attorney by state or local law.

(2) Under the *Boeing v. Shipman* standard, we believe that the jury could reasonably have found for Mairena by applying the magistrate's instructions to the evidence it was presented. The testimony of Cliff Strider, the trial division chief at the district attorney's office (who was delegating policymaking authority for trial-related matters by the district attorney), provided a reasonable basis for the jury to have concluded that the first three elements of the magistrate's instructions were met. Mr. Strider candidly conceded the importance of safeguarding the rights of material witnesses, and that assistants at the office should have an obligation to inform the judge when the execution of a material witness warrant is no longer required. Yet Mr. Strider admitted that no procedure for inquiring into the status of material witness warrants was provided in the office policy dealing with the subject. Given

the awareness of the importance of safeguarding the rights of material witnesses expressed by Mr. Strider, a policymaking official at the district attorney's office, we believe that the jury could reasonably have inferred that the failure to establish policies to protect material witnesses from wrongful arrest and incarceration was the result of callous indifference and not mere negligence.

The district attorney does not challenge the finding that Mairena was arrested and jailed for twenty-three days as a material witness when the case for which his testimony was sought had already been closed. Given this finding, it is clear that Mairena's constitutional due process rights had been violated. The evidence supports a finding that the district attorney himself was involved in the failure to establish procedures for safeguarding the rights of material witnesses. According to Ray Comstock, an investigator at the district attorney's office, and a long-time associate of the district attroney, he and the district attorney jointly formulated policy for closing cases. The policy for closing cases required checks and investigation into various matters, but did not include a check to see if there were any outstanding material witness warrants.

Because the district attorney did not object to the magistrate's instructions on policy or custom, and because the evidence supports the verdict, we reject the district attorney's argument that the policy or custom requirement had not been met.

V

[3] The district attorney contends that the jury's apportionment of the damages against him was "unconscionable." Yet the jury's apportionment of damages is a factual matter, subject to review under the deferential reasonableness standard. *Sumitomo Bank of California v.*

Product Promotions, 717 F.2d 215, 218 (5th Cir. 1983); *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc). A reasonable juror could have concluded that the major responsibility for the violation of Mairena's constitutional rights lay with the district attorney's office, since it issued the warrant for Mairena's arrest without proper safeguards. Moreover, it was the district attorney's office that was responsible for advising the other defendants, i.e., the sheriff and clerk, that the warrant for arrest was no longer required and should be cancelled. We therefore conclude that the district attorney has not shown that the evidence indicates that the jury's factual determination on the damages issue was subject to reversal under the reasonableness standard.

VI

For the reasons given earlier, the judgment of the district court is

AFFIRMED.

GARWOOD, Circuit Judge, notes his dissent.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3238

DONALD MAIRENA, CIVIL ACTION

versus NUMBER: 85-2516

CHARLES FOTI, Criminal Sheriff for the Parish of Orleans, et al., SECTION: J(4)

JUDGMENT

This came on for trial on February 13, 1986.

The Court having previously granted the motion of defendants, Charles Foti, Criminal Sheriff for the Parish of Orleans, and Edwin Lombard, Clerk of Court for the Criminal District Court for the Parish of Orleans, for dismissal;

And further considering the answers of the jury to the interrogatories propounded by the Court at the trial of this matter; and the direction of the Court as to the entry of judgment as to the remaining defendant, Harry Connick, District Attorney for the Parish of Orleans, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Donald Mairena, and against defendant, Harry Connick, District Attorney for the Parish of Orleans, in the amount of $30,000.00, together with interest at the rate of 12% per

annum from judicial demand until date of judgment and with legal interest from the date of judgment until paid and all costs.

Dated at New Orleans, Louisiana, this 20th day of February, 1986.

/s/illegible

UNITED STATES MAGISTRATE

APPENDIX D

PERTINENT STATUTES

United States Constitution, Amendment XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Louisiana Constitution of 1974, Article 5, Section 26(A):

Section 26. **(A) Election; Qualifications; Assistants.** In each judicial district a district attorney shall be elected for a term of six years. He shall have been admitted to the practice of law in the state for at least five years prior to his election and shall have resided in the district for the two years preceding election. A district attorney may select assistants as authorized by law, and other personnel.

Louisiana Constitution of 1974, Article 5, Section 26(B):

(B) Powers. Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to the grand jury. He shall perform other duties provided by law.

NO. 87-592

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY CONNICK,
District Attorney for the Parish of Orleans,
Petitioner,

versus

DONALD MAIRENA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was The Fifth Circuit Correct In Ruling That A Local District Attorney Cannot Assert The Eleventh Amendment As A Defense For The Unconstitutional Acts Of His Office?

II. Did The Jury And Courts Below Act Reasonably In Finding Liability For The Callous And Reckless Formulation Of Policies Which Caused Due Process Violations?

III. Having Failed To Object At Trial, Can Petitioner Now Challenge A Proper Jury Charge Or The Jury's Reasonable Findings Of Fact?

IV. Should Certiorari Be Granted To Address An Alleged Conflict Within The Fifth Circuit When That Court Itself Found No Conflict?

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STATEMENT OF THE CASE

I. COURSE OF THE PROCEEDINGS IN THE COURTS BELOW

Plaintiff-Respondent Donald Mairena filed this action, under 42 U.S.C. §§1983, in the United States District Court for the Eastern District of Louisiana on July 2, 1985. The Complaint named as defendants: Harry Connick, District Attorney for the Parish of Orleans (Petitioner in this Court); Charles Foti, Criminal Sheriff for the Parish of Orleans; and Edwin Lombard, Clerk of Criminal District Court for the Parish of Orleans. Plaintiff sought monetary and other relief for violations of his rights under the Due Process Clause of the Fourteenth Amendment caused by defendants' unconstitutional procedures and policies. Specifically, the "gravamen of the complaint was that Mairena was wrongfully arrested, incarcerated and detained as a material witness at a time

when his testimony was no longer necessary, the relevant criminal case having been closed." Mairena v. Foti, 816 F.2d 1061, 1063 (5th Cir. 1987) (reprinted in Petition for Certiorari ["Pet. for Cert."] at A-5).

After the clerk and the sheriff negotiated settlements with Mr. Mairena, they were dismissed as defendants from the suit. Pursuant to stipulation of the parties, the case against Petitioner Connick was conducted as a jury trial before U.S. Magistrate Ronald Fonseca. (RECORD ["R."] Vol. 1, p. 56).

Petitioner Connick filed a motion to dismiss, which was denied by the court, without prejudice to reurge the motion after plaintiff's presentation of evidence at trial. R. Vol. 1, p. 58. On the second day of trial, February 14, 1986, Petitioner Connick made a motion for directed verdict. R. Vol. 3, p. 102. After hearing arguments and deliberating, Magistrate Fonseca denied

defendant's motion and set forth detailed reasons for his decision. R. Vol. 3, pp. 113-117. At the conclusion of the trial, the court charged the jury with the applicable law and gave them a verdict form containing specific Jury Interrogatories. R. Vol. 3, pp. 137-161. After the jury retired to consider their verdict, the trial court asked counsel for both sides if they had any objections to the Jury Charge or Jury Interrogatories. R. Vol. 3, p. 161. Counsel for Respondent Mairena presented various objections (R. Vol. 3, pp. 161-163), but counsel for Petitioner Connick had "no objection." R. Vol. 3, p. 164. See also Mairena, 816 F.2d at 1064-65 and n. 2 (Pet. for Cert. at A-8).

The jury returned a verdict awarding plaintiff $40,000 in damages. According to the Jury Interrogatories (R. Vol. 1, p. 220), they found that defendant Connick and

unnamed others had violated plaintiff's federal constitutional rights. In response to specific Jury Interrogatories, they apportioned the damages by allocating $30,000 of liability to Connick and $10,000 of liability to unnamed others. The trial court adopted the jury's verdict as the judgment of the court. R. Vol. 1, p. 245; Pet. for Cert. at A-12.[1]

Petitioner Connick later filed a motion for judgment notwithstanding the verdict on various grounds, none of which included the Eleventh Amendment. R. Vol. 2, pp. 253-54. At the hearing on this motion, in response to a specific inquiry by the trial court, Connick's counsel disavowed any Eleventh

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1. The trial court later entered an order, under 42 U.S.C. §1988, against defendant Connick for plaintiff Mairena's attorney's fees and costs at trial. R. Vol. 2, p. 285.

Amendment defense in this case. After considering arguments on the various grounds which Connick did assert, the court denied his motion. R. Vol. 2, p. 279. On appeal, the Court of Appeals for the Fifth Circuit affirmed the jury's verdict and judgment of the trial court, in an opinion by Judge Jolly, Mairena v. Foti, 816 F.2d 1061 (5th Cir. 1987) (Pet. for Cert. at A-3 to A-11). Petitioner Connick then filed a petition for rehearing and a suggestion for rehearing en banc, as well as a supplemental application for en banc rehearing. All three applications were denied, without dissent. Pet. for Cert. at A-1, A-2. Petitioner Connick later filed his Petition to this Court.

II. STATEMENT OF THE FACTS

Instead of adopting the argumentative statement of facts presented by Petitioner, Respondent urges this Court to rely upon the facts as found by the Fifth Circuit, based upon uncontroverted evidence in the record, as presented to the trial court and the jury. See Mairena, 816 F.2d at 1062-63, 1065 (Pet. for Cert. at A-3 to A-5, A-9 to A-10). As the Fifth Circuit described them, the "facts in this case are like a bad dream: Donald Mairena, who had committed no crime, was arrested on an outstanding material witness warrant and, notwithstanding his pleas, thrown in jail for twenty-three days, although the case to which he was a witness had been closed months earlier when the defendant had pleaded guilty." Id. at 1062 (Pet. for Cert. at A-3). The underlying criminal case had been

closed fully eight and one-half months prior to Donald Mairena's arrest. Id. at 1063 (R. Vol. 4, pp. 10-12). The case was closed by the prosecuting assistant district attorney and administrative personnel pursuant to procedures established by that office, which included checking for the cancellation of outstanding appearance bonds and other matters, but excluded any check for outstanding material witness warrants. 816 F.2d at 1065 (R. Vol. 3, pp. 9, 47-48; R. Vol. 4, pp. 55-58). Furthermore, the "evidence supports a finding that the district attorney was himself involved in the failure to establish procedures for safeguarding the rights of material witnesses." Id. at 1065.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE ELEVENTH AMENDMENT DOES NOT SHIELD A LOCAL DISTRICT ATTORNEY'S OFFICE FROM LIABILITY FOR ITS UNCONSTITUTIONAL ACTS

A. The Eleventh Amendment Does Not Apply To Petitioner Because His Is A Local Government Office

A long line of cases clearly establishes that local government agencies do not have Eleventh Amendment immunity. That defense is available only to states and state agencies. See, e.g., Monell v. Department of Social Services, 436 U.S. 658, 690 n.54 (1978); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529, 530 (1890). See generally M. D. GELFAND, FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT 436-37 (1984). It is also well-established that a district attorney's office is a local government agency. See, e.g., Pembaur v. City of

Cincinnati, 106 S.Ct. 1292, 1296, 1300-01 (1986); Mairena, 816 F.2d at 1064 n. 1; Crane v. State of Texas, 766 F.2d 193, 195 (5th Cir.), cert. denied, 474 U.S. 1020 (1985). See also Gerstein v. Pugh, 420 U.S. 103, 106-07 (1975) (describing State Attorney for Dade County, Florida as a "county official" in a §1983 action).

All of the factors deemed crucial by this Court and lower courts demonstrate that Petitioner's office is a local government agency not entitled to Eleventh Amendment immunity from this federal constitutional suit. The Court of Appeals for the Fifth Circuit so ruled, 816 F.2d at 1064 n.1, and a petition for rehearing and application for en banc rehearing on this basis were unanimously rejected. This Court's

well-established precedents fully support those rulings.

Petitioner contends that he should be treated as a state official because his office is created by the Louisiana Constitution and his function is to enforce state law. See Pet. for Cert. 19, 21-22. This proposition is totally inadequate for several reasons. First, many other local government officials -- civil and criminal sheriffs, parish clerks of court, coroners, even parish and municipal councils -- are also created and have their duties set by the State Constitution. See La. Const. art. V, §§27-29; La. Const. art. VI, §§4-5. Clearly none of them qualify for Eleventh Amendment immunity. In addition, other local officers -- criminal sheriff, coroner, police -- also enforce state law and represent the

state. Indeed, this Court "has consistently refused to construe" the Eleventh Amendment to cover local governments and local officials, "even though such entities exercise a 'slice of state power'." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979), citing, inter alia, Mt. Healthy and Lincoln County. Instead, the critical factors have always been the nature of the governmental office involved and the likely effect of the suit upon the state treasury. See, e.g., Lake Country Estates, 440 U.S. at 401; Crane, 766 F.2d at 194-95; R. ROTUNDA, J. NOWAK & N.J. YOUNG, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 86-87 (1986).

District Attorney Connick's office is local in nature. He is a locally elected official, chosen only by the

voters in a single Louisiana parish -- Orleans (coterminous with the City of New Orleans).[2] Moreover, Louisiana law consistently treats district attorneys as parish officials rather than as officials of the State or one of its agencies. This is true of the very article of the State Constitution cited by Petitioner. See La. Const. art. VI, §§5(G), 7(B) (describing district attorney as "parish official"). Similarly, Louisiana statutes dealing with every conceivable subject--filling vacancies (see footnote 2), ethics, furnishing reports, budget and finance (discussed below)--all treat the

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2. A vacancy in the office could be filled by the New Orleans City Council, until an election is held. La. Const. art. V, §30; La. Rev. Stat. Ann. §18:602 (West Supp. 1987).

district attorney as a local government official. See, e.g., La. Rev. Stat. Ann. §§18:602(C), 39:1302(1), 39:1527(1) (West Supp. 1987); id. §§42:290(B)(West 1965); id. §42:1102(2)(f)(West Supp. 1987); id. §§42:1441-:1441.2(A) (West Supp. 1987).

Petitioner seeks to overcome this great weight of state constitutional and statutory law by citing dicta from plurality opinions in two Louisiana state court cases--Diaz v. Allstate Ins. Co., 433 So.2d 699, 701 (La. 1983), and City of New Orleans v. State, 426 So.2d 1318 (La. 1983).

The City of New Orleans case involved various state statutes requiring the City to pay portions of the salaries of some employees of various separately elected officials (e.g. district attorney, criminal sheriff, coroner). Because the statutes

involved predated the 1974 State Constitution, the Louisiana Supreme Court rejected the contention by the City of New Orleans that these statutes violated the City's constitutional home rule protection. Given this factual pattern, it is not surprising that neither the plurality nor other opinions in the case even considered state financial liability for civil rights violations committed by a district attorney. Indeed, if that case is relevant at all, it actually provides further support for Respondent's position that the local district attorney receives most of his funds from local, not state, government sources. See note 4 infra and accompanying text.

Though the facts of Diaz are somewhat more relevant, close examinations of the opinion and subsequent statutory developments reveal

that Diaz provides no real support for Petitioner's novel position. First, the Diaz court was interpreting a statute that dealt with State indemnification of officers and employees found personally liable for negligent torts. The plurality opinion quoted by Petitioner in no way considered state liability for a judgment against a governmental entity. Hence, Diaz could, at most, apply to limited aspects of a personal capacity civil rights suit.

Furthermore, the Louisiana statute interpreted in Diaz--La. Rev. Stat. Ann. §§13:5108.2 -- was specifically amended in 1984 so as to deny indemnification for "the parish officials set forth and named in Article VI, Sections 5(G) and 7(B) of the Constitution of Louisiana." Id. §§13:5108.2 (West Supp. 1987). Since the district attorney is "named" as a parish official in both §§5(G) and §§7(B)

of Article VI, it is clear that the Louisiana Legislature specifically overruled Diaz on the very point Petitioner now asserts.[3]

Noticeably absent from Petitioner's Eleventh Amendment discussion is any mention of the most crucial factor--the financing of his office. Louisiana law provides that parishes are the source of general funds for the operation of district attorneys' offices. See La. Rev. Stat. Ann. §§16:6, 16:71(D) (West 1982). Indeed, analysis of Petitioner Connick's budget reveals that the funds for the District Attorney's Office are

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3. Petitioner called both City of New Orleans and Diaz to the attention of the Fifth Circuit panel, in oral argument, and to the whole court in his supplemental application for rehearing en banc. Yet, the Court of Appeals rejected his Eleventh Amendment argument. This Court has "generally accord[ed] great deference to the interpretation and application of state law by the courts of appeals." Pembaur, 106 S.Ct. at 1301 n. 13.

derived primarily from the City of New Orleans, secondarily from local fines and forfeitures, and only in small part from the State of Louisiana.[4] The level of state government financing has long been much lower than that for the school board

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4. Relevant budget figures reflect a fairly steady increase in City funding of the District Attorney's office from $1,313,641 for fiscal year 1982, to $1,989,679 for fiscal 1987, with a recommended level of $2,052,607 for fiscal 1988. In this same period, state funding, which was already lower, declined dramatically -- from $550,000 in fiscal year 1982-83 to $87,502 in fiscal 1985-86 and $0 in fiscal 1986-87). See City of New Orleans, Recommended Budget, Fiscal 1988, at S-12 to S-14; City of New Orleans, Operating Budget for Calendar and Fiscal Year 1986 (Decision Units 8100-8101); District Attorney's ZBB Request for 1988 Budget.

Not included are State funds for salary reimbursements ($131,701 in 1984 and $151,043 for 1987). See District Attorney of Orleans Parish, Annual Financial Statements for 1984 and 1987. These dedicated salary funds are not available to satisfy judgments against the District Attorney's Office. See La. Rev. Stat. Ann. §§16:10-11, 39:1304(C)(2), 42:1441(A), 42:1441.1, 42:1441.1, 42:1441.2(A) :1441.2(A) (West Supp. 1987).

in Mt. Healthy, where this Court found no Eleventh Amendment bar, despite "significant" state financial contributions. See also Crane v. State of Texas 766 F.2d at 193, 195 (5th Cir.), cert. denied, 474 U.S. 1020 (1985) (partial state reimbursement treated as insufficient).

Even more telling for Eleventh Amendment purposes, Louisiana law specifically provides:

> The state of Louisiana shall not be liable for any damage caused by a district attorney, coroner, assessor, sheriff, clerk of court, or public officer of a political subdivision within the course and scope of his official duties, or damage caused by an employee of a district attorney, coroner, assessor, sheriff, clerk of court, or public officer of a political subdivision.

La. Rev. Stat. Ann. §42:1441(A)(West Supp. 1986)(emphasis added). This clear

and explicit prohibition of state liability for any damages assessed against district attorneys has been reaffirmed and reinforced by subsequent legislation. See La. Rev. Stat. Ann. §42:1441.2(A) (West Supp. 1987) (provisions imposing respondeat superior liability "shall not impose liability upon the state for the offenses and quasi-offenses of any of those public officers named in and designated as parish officials in Article VI, Section 5(G) and 7(B) of the Constitution," which lists "district attorney" as a parish official); La. Rev. Stat. Ann. §13:5108.2(A)(2)(West Supp. 1987)(state indemnification of its officials, similarly excluding district attorneys and other parish officials).[5]

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5. See also La. Rev. Stat. Ann. §42:1441.1 (West Supp. 1987) (state liability only for persons "expressly specified" to be state officials, and

Because only those judgments which "require payment of state funds are barred by the Eleventh Amendment," Quern v. Jordan, 440 U.S. 332, 337-38 n.6 (1979), the small jury verdict in this case cannot possibly be barred. See also Edelman v. Jordan, 415 U.S. 651, 668 (1974). Far from requiring payment from the state treasury, Louisiana law (as detailed above) expressly, and repeatedly, prohibits State payment of such a damage award. See Moor v. County of Alameda, 411 U.S. 693, 719 (1973) (state statute making counties liable

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(footnote 5 continued)

district attorneys not so specified); La. Rev. Stat. Ann. §39:1527(1)(West Supp. 1987) (Public Finance: excluding "parish officials," such as district attorneys, from liability insurance program for "state agencies"); La. Rev. Stat. Ann §39:1302(1) (West Supp. 1987) (Local Government Budget Act, which defines "political subdivision" to include "independently elected parish offices, including the office of. . .district attorney").

for judgments against them precluded Eleventh Amendment defense); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 402 (1979) (similar provisions as to planning agency).

In short, all of the crucial electoral, jurisdictional, and financial factors definitively point to one simple conclusion--the Office of the "District Attorney for Orleans Parish" is a local government agency not entitled to an Eleventh Amendment defense for its unconstitutional policies.[6]

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6. Petitioner's reliance upon Imbler v. Pachtman, 424 U.S. 409 (1976) is similarly misplaced. Imbler deals only with claims against a prosecutor in his personal capacity. This Court has regularly explained the distinction between such a personal defense and an institutional defense (such as the Eleventh Amendment). See, e.g., Owen v. City of Independence, 445 U.S. 622, 638, 655-57 (1980); Lake Country Estates, 440 U.S. at 401-05.

Furthermore, any personal capacity aspects of this suit would not concern discretionary prosecutorial actions, i.e. the authority of the district

B. Petitioner Cannot Now Assert An Eleventh Amendment Defense

Even if this Court were willing to overrule the great weight of this state and federal law demonstrating that the Orleans Parish District Attorney's Office is a local government entity that is outside the scope of the Eleventh Amendment, Petitioner cannot now assert an Eleventh Amendment defense in this case, as he has waived such a defense and consented to suit. The same "prudential objection to reversing a judgment" which guided the court last Term in City of Springfield v. Kibbe, 107 S.Ct. 1114, 1116 (1987) (per curiam), should also apply to this waiver.

(footnote 6 continued)

attorney to issue material witness warrants is not challenged. Instead, only policies involving purely administrative, post-prosecutorial activities are challenged. See Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 734-35 (1980); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980).

Petitioner specifically waived any Eleventh Amendment defense to this suit. The defense does not appear in Petitioner Connick's answer (R. Vol. 1, p. 204), and it was not asserted as a basis for his motion to dismiss (R. Vol. 1, p. 31), or his motion for judgment n.o.v. (R. Vol. 2, pp. 253-54). In addition to these acts of abandonment, Petitioner Connick's counsel--all of whom are legally knowledgeable members of the Louisiana Attorney General's Office--took affirmative steps which constituted direct consent to suit and waiver of the defense. Prior to trial, Connick's counsel cited the absence of a sovereign immunity defense from the case as the principal rationale for quashing the subpoena duces tecum (directed to Mr. Connick and the budget of the

District Attorney's Office). See Toll v. Moreno, 458 U.S. 1, 18 (1982); Vargas v. Trainor, 508 F.2d 485, 492 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975)("A representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in Edelman.").

Furthermore, at the hearing on Connick's motion for judgment notwithstanding the verdict, his counsel--then a Deputy Attorney General --specifically disavowed and waived any Eleventh Amendment defense when directly questioned on this point by the trial court. See id; Richardson v. Fajarado Sugar Co., 241 U.S. 44, 47 (1915); Porto Rico v. Ramos, 232 U.S. 627, 631 (1914). See also Clark v. Barnard, 108 U.S. 436, 447-48 (1883); Vecchione v. Wohlgemuth, 558 F.2d 150, 156-57 (3d Cir. 1977).

Petitioner attempted to resuscitate the defense in his brief to the Fifth Circuit. That court dealt with the claim and rightly rejected it. 816 F.2d at 1064 n.1.

Finally, Petitioner cannot now be heard to assert that the Eleventh Amendment is a quasi-jurisdictional bar, allowing him to recant his affirmative waiver and revive the defense. Petitioner in the instant case, Orleans Parish District Attorney Harry Connick, was also the petitioner in Connick v. Myers, 461 U.S. 137 (1983).[7] This Court

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7. In Myers, the Eleventh Amendment was presented as a defense in Connick's petition for a writ of certiorari. See 50 U.S.L.W. 3571, 3674 (1981). The general grant of certiorari in no way excluded the Eleventh Amendment issue, 455 U.S. 999 (1982), and the issue was fully briefed by both sides. See Brief for Petitioner at i and 15-17, Connick v. Myers (No. 81-1251); id., Brief for Respondent at i and 34-41, id., Supplemental Brief for Petitioner; id., Supplemental Brief for Respondent.

ruled on the merits in Myers, thereby effectively rejecting any contention that the Eleventh Amendment was a quasi-jurisdictional bar to suit against this very Petitioner.

For all of these reasons, Respondent urges this Court to decline Petitioner's invitation to overrule your well-established Eleventh Amendment precedents solely to shield a local district attorney's office from liability for its unconstitutional acts.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT THE EVIDENCE IN THE RECORD SUPPORTED THE JURY'S VERDICT WITH SPECIAL INTERROGATORIES BASED UPON A PROPER JURY CHARGE

Petitioner asserts that the Court of Appeals for the Fifth Circuit erroneously upheld a jury verdict with special interrogatories which found him liable under 42 U.S.C. §§1983. Such a contention must be premised either upon

the jury allegedly receiving incorrect instructions from the trial court or upon alleged insufficiency of evidence to support the verdict. See Mairena v. Foti, 816 F.2d 1061, 1064-65 (5th Cir. 1987) (Pet. for Cert. at A-7 to A-8). Neither is applicable in this case.

Nor is this a case in which the finding of liability has been muddied by inconsistent jury verdicts. See Praprotnik v. City of St. Louis, 798 F.2d 1168, 1172 n.3 (8th Cir. 1986), argued, 56 U.S.L.W. 3286 (Oct. 20, 1987) (No. 86-772). The jury in the instant case was correctly charged by the trial court, based up this Court's opinions. The instructions provided, inter alia, that liability could attach only if "the failure of Harry Connick to establish such a procedure was deliberate, or the result of callous indifference. Mere negligence ... is insufficient ...." R.

Vol. 3, p. 147.[8] Based upon these instructions, the jury weighed the evidence and arrived at a reasonable verdict, explained by their responses to special interrogatories.[9] Furthermore, Petitioner is estopped to raise objections to the jury verdict as he neither objected to the jury charge nor moved for a new trial. See part III, below.

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8. The court added that "to find defendant Harry Connick liable, you must find that he actually participated in the event complained of ...." R. Vol. 3, p. 149. Respondent Mairena objected to this portion of the jury charge as being too restrictive. See R. Vol. 3, pp. 162-63; see also footnote 11, infra.

9. The jury acted very reasonably in apportioning the damages among defendants responsible for Respondent Mairena's unconstitutional detention for 23 days. Petitioner Connick was held liable for only $30,000. Pet. for Cert. at A-5, A-6, A-12.

A. The Jury Properly Found That There Was An Affirmative Policy Not To Clear Outstanding Material Witness Warrants

This case does not concern simply the failure to adopt a proper policy. Instead, it involves the callous and reckless establishment and adoption, by Petitioner himself and by his subordinates (to whom he delegated authority), of an affirmative, consistent policy of not clearing outstanding material witness warrants before closing a criminal case. As the jury found, Petitioner Connick callously and recklessly crafted a policy pursuant to which his subordinates would not check whether a material witness warrant was outstanding before closing a case. See Mairena, 816 F.2d at 1065 (Pet. for Cert. at A-10). See also Wanger v. Bonner, 621 F.2d 675, 679-80 (5th Cir. (1980)(imposing liability upon sheriff

for his policy that deputies would not verify addresses before serving out-of-county arrest warrants).

Ray Comstock, long-time associate of Petitioner Connick, testified at trial that Petitioner and he did not include a check for the existence of outstanding material witness warrants when they formulated the policy for closing cases, even though he agreed that such a check was needed. Mairena, 816 F.2d at 1065 (Pet. for Cert. at A-9 to A-10). Furthermore, Clifford Strider, Chief of Trials in the District Attorney's Office, testified that there should be a policy of checking for outstanding warrants in light of the deprivations of liberty which can result from failure to cancel. See R. Vol. 4, pp. 63, 70-72. The jury could properly find, and the Court of Appeals could properly uphold a finding, that this

testimony, along with other evidence, supported the verdict of liability against Petitioner for callous and reckless indifference to Respondent's Constitutional rights.

As the testimony at trial firmly established that a formal process was followed by Petitioner in crafting the policy to be followed in closing cases, this case is far-removed from one in which there may be a question as to whether the appropriate official has adopted a particular policy. See, e.g., Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1299 (1986); Praprotnik, 798 F.2d at 1173-1175 (8th Cir. 1986), argued, 56 U.S.L.W. 3286 (Oct. 20, 1987) (No. 86-772).

B. The Jury Properly Found That Respondent's Incarceration Was Not A Single, Isolated Incident

Petitioner asserts that the Fifth Circuit's decision in this case conflicts with City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In this argument, however, Petitioner misinterprets that case. A governmental policy becomes effective when adopted, and applies the first (and each) time it is followed. In Tuttle, both the plurality and the concurring opinions recognized that a single discrete act implementing an unconstitutional policy can be sufficient to establish liability under §1983. As Justice Rehnquist noted: "[o]bviously, it requires only one application of a policy ... to satisfy fully Monell's requirement." Tuttle, 471 U.S. at 822 (plurality). See id. at 832 (Brennan, J.,

concurring). See also Owen v. City of Independence, 445 U.S. 622 (1980)(imposing liability for a single act denying procedural due process).

Furthermore, Tuttle's holding -- that a single incident by a lower echelon police officer acting on his own is insufficient to establish municipal liability -- has no application to the instant case, in which the elected, policymaking official was found liable for his own callous and reckless disregard. See Pembaur, 106 S.Ct. at 1299-1300 n.11 ("the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers"); id. at 1309 n.6 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.)("[t]he local government unit may be liable for the first application of a duly constituted

unconstitutional policy").[10]

Petitioner claims that Donald Mairena's incarceration was "an isolated incident" and, therefore, cannot serve as the basis for Petitioner's liability. Pet. for Cert. at 13. Petitioner then attempts to explain away yet another incident (of which his office was aware, see R. Vol. 4, pp. 70, 103-04, 106) as "inapposite." Pet. for Cert. at 13. In fact, Linday Howard was jailed on a grand jury material witness warrant so that she would be available to testify before the grand jury. See Exhibit P-2; R. Vol. 3, pp. 62-64, 98. However, she was not arrested until after the grand jury had been disbanded. Thus, like

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10. Justice Stevens' concurrence reiterated his view that respondeat superior alone should be a valid basis for municipal liability. See Pembaur, 106 S.Ct. at 1303.

Respondent Mairena, she was arrested only after the hearing for which she was sought had terminated. She was imprisoned for 11 months and was able to obtain her release only by filing a pro se petition for a writ of habeas corpus. See Exhibit P-2; R. Vol. 3, pp. 62-64, 98. Petitioner now claims, for the first time in this litigation, that Ms. Howard was "deliberately held so she could testify at the subsequent trial." Pet. for Cert. at 13. This new assertion runs completely contrary to the unrebutted testimony at trial and to the fact that it was a grand jury material witness warrant upon which she was arrested rather than a trial witness warrant. Thus, Mairena's situation was not an isolated incident. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 106 (1975) (not allowing even a suspect to "be detained for a substantial period

solely on the decision of a prosecutor").

Petitioner's contention that he should not be liable for unconstitutional acts, such as those which injured Respondent Mairena and at least one other person, would produce absurd results. A local government and its officials would then be entitled to one or, as proven below, two "free" violations of citizen's constitutional rights. Indeed, this Court has repeatedly rejected Petitioner's erroneous "first bite" theory of §1983 litigation. See, e.g., Pembaur, 106 S.Ct. at 1298-99; Tuttle, 471 U.S. at 822; Owen v. City of Independence, 445 U.S. 622 (1980).

C. The Jury Properly Found That The Violation Of Respondent's Constitutional Rights Was Caused By Petitioner's Policy

Respondent Donald Mairena was unconstitutionally incarcerated as a direct result of Petitioner's callously and recklessly formulated policy. The Congressional prohibition against "subject[ing] or caus[ing] to be subjected" to a deprivation of federal rights squarely encompasses this case. See 42 U.S.C. §1983 (1982). There can be no doubt that the policy for closing cases, as callously crafted by Petitioner, was the "moving force" behind Respondent's unconstitutional jailing. See Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978). This is not a case where "any number of other factors were also in operation that were equally likely to contribute or play a predominant part in bringing

about the constitutional injury." City of Springfield v. Kibbe, 107 S.Ct. 1114, 1120 (1987) (O'Connor, J., dissenting). Donald Mairena was incarcerated on a material witness warrant 8 1/2 months after the underlying criminal case had been closed. But for Harry Connick's reckless policy, that incarceration would not have occurred.

III. HAVING FAILED TO OBJECT AT TRIAL, PETITIONER CANNOT NOW CLAIM THAT THE JURY INSTRUCTIONS OR FINDINGS WERE INCORRECT

A party cannot "assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict." Fed. R. Civ. P. 51. As noted by the Fifth Circuit, Petitioner Connick failed to object to the proposed jury instructions regarding the standard by which §1983 liability could be imposed.

Mairena, 816 F.2d at 1064 (Pet. for Cert. at A-8).[11] Therefore, the instant case is governed by the rule reaffirmed only last Term in Kibbe. Like the petitioner in Kibbe, Harry Connick failed to object to jury instructions on §1983 liability. As a result of that petitioner's failure to preserve this issue, the Kibbe Court dismissed the writ of certiorari as improvidently granted. 107 S.Ct. at 1116. The same well-established principle governs here. See Mairena, 816 F.2d at 1064 n.2.

Even if this Court were to disregard the "considerable prudential objection" which required dismissal of the suit in Kibbe, see id., Petitioner would gain nothing. The instruction

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11. Respondent Mairena, on the other hand, did object to the instructions, as they seemed to impose too high a burden upon plaintiff. See Mairena, 816 F.2d at 1064 n.2 (Pet. for Cert. at A-8); footnote 8, supra.

actually given at the trial below specified that liability could be found only where the policy "was deliberate, or the result of callous indifference." R. Vol. 3, p. 147. This charge is almost identical to the standard approved by the Kibbe dissenters: that liability should lie only where the policy "amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain." 107 S.Ct at 1121 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and White and Powell, JJ.).

If this Court were to grant certiorari, reverse the Fifth Circuit, and remand for a new trial (for which Petitioner never moved), any instruction would be virtually identical to the one already given to the jury below (in February 1986). The same, or quite similar, evidence would again be

presented at trial. And, once again, a reasonable jury could easily find the same liability on the part of Petitioner Connick as did the jury below. That jury did not run amok; they awarded a modest amount of damages--$30,000--for the "grievous wrong done to Mairena," who was never a suspect, for his 23 days of confinement. Mairena, 816 F.2d at 1064 n.2 (Pet. for Cert. at A-8 n.2). Cf. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships"). Such protracted proceedings would be a waste of the limited judicial resources of this Court, the Court of Appeals, and the trial court, and would accomplish little, if anything.

IV. PETITIONER'S ASSERTION THAT THE DECISION IN THIS CASE CONFLICTS WITH OTHER FIFTH CIRCUIT DECISIONS IS NEITHER CORRECT NOR IS IT A BASIS FOR GRANTING CERTIORARI HERE

Petitioner Connick maintains that the Fifth Circuit decision which he seeks to bring before this Court "conflicts with the decisional law of the Fifth Circuit." Pet. for Cert. at 14, 18. In fact, the decision in the instant case is even more generous to Petitioner Connick than decisions of other Courts of Appeals, including the Fifth Circuit, have been to §1983 defendants. See, e.g., Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1987) (post-Pembaur liability for deliberate indifference); Williams v. Butler, 802 F.2d 296 (8th Cir. 1986) (en banc) (same for overdelegation of final authority), pet. for cert. filed, 55 U.S.L.W. 3476 (Jan. 13, 1987) (No. 86-1049); Kibbe v. City of Springfield,

777 F.2d 801 (1st Cir. 1985) (liability for gross negligence), cert. dismissed as improvidently granted, 107 S.Ct. 1114 (1987); Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985) (liability for failure to train and discipline), cert. denied, 107 S.Ct. 1369 (1987); Lozano v. Smith, 718 F.2d 756 (5th Cir. 1983); (liability for failure to supervise). Moreover, even an actual inconsistency in the "decisional law" of a Court of Appeals would rarely be a ground for the exercise of this Court's discretionary jurisdiction.

There is no conflict within the Fifth Circuit. In Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984) Judge

Garwood's[12] opinion held that there must be "gross negligence amounting to conscious indifference" before liability can attach. 717 F.2d at 227. This standard is nearly identical to the actual jury charge in the instant case, see Mairena, 816 F.2d at 1065 (Pet. for Cert. at A-9), a charge to which Petitioner failed to object at trial. See Mairena, 816 F.2d at 1064 n.2. (Pet. for Cert. at A-8).

Nor does the instant case conflict with Crane v. State of Texas, 759 F.2d 412, reh'g denied, 766 F.2d 195 (5th Cir.) cert. denied, 474 U.S. 1020 (1985). In Crane, the Fifth Circuit

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12. Judge Garwood noted his dissent from the panel's decision below, but he did not point to any inconsistency with his Languirand opinion. Furthermore, Judge Garwood neither dissented from the denial of the petition for rehearing, nor requested that the Fifth Circuit be polled on rehearing en banc in the instant case.

panel found that a District Attorney's "choice of an unsound and legally insufficient system [regarding misdemeanor capias warrants] represents County policy." Crane, 759 F.2d at 430. Indeed, the decision below cited Crane with approval. Mairena, 816 F.2d at 1064 n.1. (Pet. for Cert. at A-6).

No conflict in the Fifth Circuit has been found by the court in the best position to detect any conflict--the en banc Fifth Circuit. No Judge on the Fifth Circuit requested polling for a rehearing en banc; no Judge has found the inconsistency with long-standing Fifth Circuit precedent claimed by Petitioner. See, e.g., Ramie v. City of Hedwig Village, 765 F.2d 490, 493 (5th Cir. 1985)(dicta regarding isolated incidents by individual police officers), reh'g denied, 770 F.2d 1081, cert. denied, 474 U.S. 1062 (1986);

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984), cert. denied, 472 U.S. 1016 (1985)(policymaking authority obtained "by virtue of the office to which that officer is elected"); Vela v. White, 703 F.2d 147, 154 (5th Cir. 1983)(no liability because evidence indicated that chief of police "took steps to improve the recording and analysis of information ... pertaining to the disposition of complaints") (emphasis added); Wanger v. Bonner, 621 F.2d 675, 679 (5th Cir. 1980)(imposing liability upon sheriff for actions of deputies taken "pursuant to policies implemented by Sheriff").

Furthermore, even if there were an actual inconsistency within the Circuit, that generally would not be a basis for granting certiorari. See Sup. Ct. R. 17.1(a), (c). In limited instances, none of which apply here, this Court

has remarked on intracircuit splits when granting certiorari.[13] The general rule against such a grant is stated by Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), which dismissed a certified question specifically requesting this Court to resolve a split within a circuit:

> [D]oubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a

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13. There seem to be three such instances. First, where an intracircuit split coincides with a split among the circuits, see, e.g., Scarborough v. United States, 431 U.S. 563, 567 (1976); Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1966). Second, where a circuit panel comments on the intracircuit split and on the undesirability of the holding it feels bound to follow, see, e.g., Dickinson v. Petroleum Corp., 338 U.S. 507, 508 (1950); Maggio v. Zeitz, 333 U.S. 56, 59, 70, 77 (1948). Third, where an important issue independently supports certiorari supervision, see, e.g., Davis v. United States, 417 U.S. 333, 340-41 (1974); John Hancock Life Ins. Co. v. Bartels, 308 U.S. 180, 181 (1939).

> jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties.

Id. (emphasis added).

The Fifth Circuit follows the general rule that one panel of the court will not overrule another panel unless intervening binding authority requires the panel to decide differently. See, e.g., White v. Estelle, 720 F.2d 415, 417 (5th Cir. 1983). A panel can be overruled only by the court sitting en banc. Further, even if the Mairena decision below were deemed to create a split within the circuit, the Fifth Circuit has adopted a rule to govern that situation.[14]

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14. Whenever two panels of the court arrive at inconsistent decisions, the inconsistency is resolved in favor of the earlier decision. See, e.g., United States v. Gray, 751 F.2d 733, 735 (5th Cir. 1985); Odell v. North River Ins. Co., 614 F. Supp. 1556 (W.D. La. 1985).

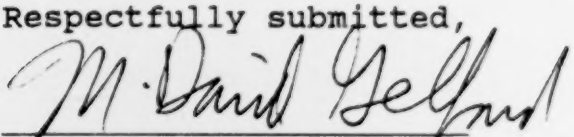
Thus, an intracircuit split is selfhealing -- it does not require application of the limited resources of this Court.

CONCLUSION

Respondent Donald Mairena's constitutional rights were violated by his being held 23 days on an outdated material witness warrant. Mairena's incarceration was directly caused by the policy crafted by District Attorney Harry Connick. Petitioner Connick simply did not think it worthwhile, when his office closed cases, to determine whether any persons would be arrested and languish in jail months later -- persons who had committed no crimes, who were not suspected of criminal activity, and who were no longer needed by Petitioner in his criminal prosecutions.

For these reasons, Respondent Mairena urges this Court to deny the petition.

Respectfully submitted,

By 

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The assistance provided by Andrew C. Simpson, and Rebecca King is gratefully acknowledged.